Supreme Court, U.S.
FILED
APR 3 - 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners*

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

[Additional Captions on Inside Front Cover]

On Writs of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS OF FERTILITY AND MARRIAGE IN SUPPORT OF RESPONDENTS & AFFIRMANCE

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VALERIA TANCO, ET AL., PETITIONERS

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.

APRIL DEBOER, ET AL., PETITIONERS

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.

GREGORY BOURKE, ET AL., PETITIONERS

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY ET AL.

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INTRODUCTION AND INTERESTS OF AMICI[1]

Amici Scholars of Marriage and Fertility are prominent academic experts in marriage and family relations, and have joined to share their considerable expertise concerning same-sex marriage and its effect on our broader culture, particularly with respect to procreation and fertility:

Dr. Jason S. Carroll, Professor of Family Life,
Brigham Young University

Dr. Walter Schumm, Professor of Family Studies,
Kansas State University

Both have written extensively about family relations in the United States. Based on their research regarding marriage generally and the meaning of marriage among Americans, *amici* believe that states have a substantial interest in supporting and encouraging marriage among opposite-sex couples in order to highlight the procreative aspects

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[1] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), amici affirm that no counsel for a party authored the brief in whole or in part and no person other than the amici or their counsel made a monetary contribution to this brief. Affiliations of signatories are given for information only and do not constitute the endorsement of the contents of this brief by any institution listed.

of marriage, and in declining to extend similar recognition to same-sex couples.

SUMMARY

This Brief provides further analysis of the "procreative norm" associated with the man-woman definition of marriage, as described in the Brief *Amici Curiae* of Scholars of Marriage, also filed in this case. [2] *Amici* there assert that a genderless redefinition of marriage would undermine the critical social norm linking marriage with procreation, and weaken the institution of marriage as a whole, with significant implications for our broader society. We concur, and further declare in that weakening that link would have a profound impact on the United States' already below-replacement level fertility rate, increasing the likelihood of bringing within our borders the socioeconomic problems experienced by countries abroad with sustained, extremely low fertility rates.

In Section I, we discuss the centrality of a man-woman definition of marriage to perpetuating and maintaining the link between marriage and procreation, the importance of societies reproducing in adequate numbers, and the resulting interest states have in recognizing and encouraging marriage between opposite-sex couples on the explicit grounds of these couples' intrinsically generative, procreative capacity. This interest is sufficiently significant to

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[2] Brief *Amici Curiae* of Scholars of Marriage, *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, 14-574.

overcome any interest a state may have in same-sex couples that commit to exclusive, sexually intimate relationships, but lack the inherently generative capacity of opposite-sex couples. We also detail this Court's long history of recognizing, with approval, states' interest in the procreative aspect of marriage as an essential building block of a stable democratic society. Retreating from this extensive record would undercut the states' far-reaching interests in marriage.

In Section II, we explore the impact same-sex marriage would have on fertility rates if the procreative norm is eroded. We point to the the actual experience of states and nations that have adopted a genderless redefinition of marriage, to declare that such a redefinition would erode the role of marriage in our society, ultimately leading to fewer marriages and fewer births. We use empirical data to shed light on the potential consequences of diminishing the procreative aspects of marriage in favor of same-sex marriage. Ultimately, these data indicate that redefining marriage to include same-sex couples is likely to result in fewer marriages overall, including among heterosexual couples, which leads to fewer births.

In Section III, we warn that a prolonged reduction in fertility rates creates enormous risks to the economic well-being of the United States. Countries with sustained, below-replacement level fertility rates experience a range of socioeconomic problems,

including a shortage of workers supporting intergenerational welfare programs, increased taxes on such workers, burdensome government spending on health care programs, reduced capital investment, diminished international influence, and crippling ratios of gross debt to gross domestic product. It is well within a state's interest to choose not to assume the risk of such devastating domestic difficulties.

In light of these facts, we join with the Petitioners in declaring that states have a strong interest in affirming opposite-sex marriage in order to preserve the vital link between marriage and procreation.

ARGUMENT

I. The state's interest in ensuring adequate reproduction warrants singling out traditional marriage for protection.

Petitioners assert that the Equal Protection Clause of the Fourteenth Amendment prohibits states from defining marriage as the union of a man and a woman because the states lack sufficiently strong interests in maintaining that definition. In fact, however, that definition is supported by and substantially furthers numerous compelling state interests. In addition to the interests cited by Respondents and other *amici*, a state's interest in ensuring adequate reproduction rates is sufficient to justify their recognition of opposite-sex unions, but not same-sex partnerships, as "marriages."

States have a legitimate interest in ensuring the orderly reproduction of society over time.[3] This interest necessarily entails ensuring a sufficient and sustainable fertility rate. Because only opposite-sex couples can procreate, and therefore sustain a fertility rate, encouraging, promoting, and supporting the formation of opposite-sex relationships furthers the state's interests in perpetuating the long-term survival of its citizenry and sustaining intergenerational welfare programs such as Social Security.

States are constitutionally permitted to classify individuals into groups "possess[ing] distinguishing characteristics relevant to interests the State has the authority to implement."[4] Even more relevant to the question of same-sex marriage, this Court has affirmed the constitutionality of state classifications where recognizing or benefitting one group "promotes a legitimate governmental purpose, and the addition of other groups would not."[5]

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[3] Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Br. J Am. Leg. Studies 411 *passim* (2012).

[4] *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quotation marks omitted).

[5] *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

As described in Section III below, recognizing same-sex marriage as an institution narrowly defined by petitioners as an adult-centered "status of profound personal and legal significance carried by two spouses"[6] would not only fail to promote the government's substantial interest in opposite-sex marriages, but would contravene that interest by threatening the state's fertility rate, and with it the state's long-term economic stability. Undoubtedly the state also values adults' interests in marriage: adult happiness, mutual commitment, increased stability, and social esteem. Yet a definition of marriage that focuses solely on these adult-centric interests is incomplete and denies the Court's decisions affirming the states' interests in procreation. However compelling such a definition might be, it is fatally defective if its adoption brings about conditions such that our society fails to reproduce itself over time, or fails to produce enough posterity to sustain existing intergenerational welfare programs.

A. Traditional marriage is critical in perpetuating and maintaining the vital conceptual link between marriage and procreation in our broader culture.

The legal institution of marriage has the expressive effect of socially recognizing, promoting

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[6] *Obergefell v. Hodges*, Joint Petition for Writ of Certiorari, at 29.

and dignifying the nature of the relationships that the law deems eligible for marriage. The expressive effect of legal marriage is the crux of the marriage debate: which rival conception of marriage should harness the law's expressive effect and be reinforced by the law's coercive and pedagogical powers?[7] Judges and scholars have oft expressed a view that the law can play a powerful "teaching" function.[8] For

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[7] See Martha Nussbaum, *A Right to Marry? Same-Sex Marriage and Constitutional Law*, Dissent, (Summer 2009), available at http://www.dissentmagazine.org/article/?article=1935. C.f. Adam Haslett, *Love Supreme*, The New Yorker, May 31, 2004, at 19 ("As a political and cultural matter, [same-sex marriage cases] are contests over something less easy to codify: the official recognition of love.. The state is being asked not only to distribute benefits equally but to legitimate gay people's love and affection for their partners. The gay couples now marrying in Massachusetts want not only the same protections that straight people enjoy but the social status that goes along with the state's recognition of a romantic relationship") quoted in William C. Duncan, *Marriage and the Utopian Temptation*, 59 Rutgers L. Rev. 265, 272 (2007)) in O'Brien *supra* note 2 at 413.

[8] Alan S. Hawkins & Jason S. Carroll, *Beyond the Expansion Framework: How Same-Sex Marriage Changes the Institutional Meaning of Marriage and Heterosexual Men's Conception of Marriage*, 28 B.Y.U. J.P. Law (forthcoming) at 20; Cass R. Sunstein(a), *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996) at 2027-28; Eric A. Posner, *Law and Social Norms* (2000); Robert Cooter *Expressive Law and Economics*, 27 J. Legal Stud. 585 (1998); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev.

example, in his concurrence in *University of Alabama v. Garrett*, Justice Kennedy noted the democratically enacted disability law's power to "teach" society the norm of treating persons with disabilities as full-fledged citizens.[9] It is this "expressive effect" or "teaching power" that will serve either to reinforce or to undermine the stabilizing social norms associated exclusively with opposite-sex marriage.

After all, the more effectively the law defines marriage, and thus teaches about marriage, the more likely people are to enter into marriage and abide by its norms.[10] And the more people form marriages and respect marital norms, the more likely it is that children will result, perpetuating both the norms and the society itself, throughout generations. If the law does not effectively define marriage to promote these norms, a contrary result can be expected. Thus, preserving the nature of marriage in law, with an eye towards these norms, is crucial for maintaining not only the great flow of social benefits produced by marriage as an institution, but ultimately the survival of the society itself.

2181 (1996) at 2186-87; Cass R. Sunstein(b), *Social Norms and Social Rules*, 96 Colum. L. Rev. 903 (1996).

[9] *University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring).

[10] Sherif Gergis, Robert P. George & Ryan T. Anderson(a), *What is Marriage?* Harv. J.L. & Pub. Pol'y, Vol. 34, No. 1 245 (Winter 2010) at 269.

It is with an eye towards preservation of our society that these *amici* focus. Taking a cue from the expert discussion of several institutionally grounded marriage norms in the brief filed on behalf of a venerable group of marriage scholars in this case, we provide further analysis of the "procreative norm" presented there.[11]

The essence of that procreative norm is thus: marriage is intrinsically and inextricably linked with procreation, and therefore can and must only occur between one man and one woman. The most basic message conveyed by the institution of marriage across virtually all societies is that where procreation occurs, *this* is the arrangement in which society prefers it to occur. Although sex and procreation may occur in other settings, marriage marks the boundaries of procreation that is socially commended.[12] Although marriage benefits its adult participants in countless ways, it is "*designed* around procreation."[13] The man-woman definition conveys and reinforces that marriage is centered primarily on

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[11] Brief *Amici Curiae* of Scholars of Marriage, *supra* note 2.

[12] Amy L. Wax, *The Family Law Doctrine of Equivalence*, 107 Michigan L. Rev. 999 (2009) at 1012; Sherif Gergis, Robert P. George, & Ryan T. Anderson(b), *What is Marriage? Man and Woman: A Defense* (2012) at 38; John Corvino & Maggie Gallagher, *Debating Same-Sex Marriage* (2012) at 96.

[13] Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harvard J. Law & Pub. Policy 949 (2006) at 954.

procreation and children, which man-woman couples are uniquely capable of producing naturally.[14]

This norm serves an essential societal purpose: it reinforces the notion that society wants procreation to occur *at all* by setting apart for special recognition and benefits the intrinsically generative relationships wherein procreation is possible. By contrast, members of societies which lack this norm, or whose policies have served to dilute it, have lost appreciation for the social value of creating and rearing children, and are simply less likely to do so. That altered norm, if sufficiently widespread, puts at risk society's ability to reproduce itself—at least at levels sufficient to maintain intergenerational social welfare programs.[15]

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[14] Kingsley Davis, *The Meaning and Significance of Marriage in Contemporary Society*, in Contemporary Marriage: Comparative Perspectives on a Changing Institution (Kingsley Davis, ed. 1985) at 7-8; James Q. Wilson, *The Marriage Problem* (2003) at 23; William Blackstone, 1 *Commentaries on the Laws of England* (1765) at 422; John Locke, *Second Treatise of Civil Government* (1690) §§78-79; Anthropological Institute of Great Britain, *Notes and Queries on Anthropology* (6th ed. 1951) at 71; W. Bradford Wilcox(b), *When Marriage Disappears: The Retreat from Marriage in Middle America* (2010), available at http://stateofourunions.org/2010/SOOU2010.pdf at 18-19; Girgis et al.(b), *supra* note 11 at 38; Wax, *supra* note 11 at 1000.

[15] Lynn Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital*

Critics of the procreative norm are quick to point out that not only are many viable parenting arrangements not "intrinsically generative," but also that many opposite-sex marriages cannot or do not beget children, as if these circumstances render this norm meaningless. These exceptions do not swallow the norm. While homosexual adoptive and foster parenting arrangements are certainly viable and valuable, they do not render such arrangements generative. The possibility of Assisted Reproductive Technology also does not make homosexual relationships generative. While contraception or infertility may lower the odds of a heterosexual couple reproducing, it does not alter the fact that heterosexual relationships *are* intrinsically generative.[16]

It is by setting apart these intrinsically generative relationships, and no other kind of relationships, as "marriages," that the benefits of the procreative norm

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Procreation, 24 Harv. J. L. & Pub. Pol'y 771 (2001) at 782,87-89; O'Brien, *supra* note 2 at 431-32, 438-41.

[16] O'Brien, *supra* note 2 at 438-41. See also Girgis, et al.(a) *supra* note 9 at 266 for a further discussion on the marital legitimacy of infertile couples: ..."a stomach remains a stomach—an organ whose natural function is to play a certain role in digestion—regardless of whether we intend it to be used that way and even of whether digestion will be successfully completed. Something analogous is true of sexual organs with respect to reproduction."

will be manifest and perpetuated in our broader culture. Because of the critical role opposite-sex marriage plays in perpetuating and maintaining the vital conceptual link between marriage and procreation, it warrants the exclusive recognition, promotion, and protection of the state. Judge Perez-Gimenez was thus correct in concluding recently that "[t]raditional marriage"—that is, man-woman marriage—"is the fundamental unit of the political order. Ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage."[17]

B. This Court and the lower courts have long recognized with approval the value of states' interest in the procreative aspects of marriage

The link between marriage and procreation is not mere scholarly theory. The state's legitimate interest in ensuring reproduction within marriage is a theme of marriage jurisprudence reflected in the decisions of U.S. state and federal courts from 2000 to the present that deal with same-sex unions. Since 2000, all eleven judicial decisions, including the Sixth Circuit decision at issue here, that have specifically upheld the traditional definition of civil marriage, accepted with approval the defendants' appeal to the

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[17] *Conde-Vidal v. Garcia-Padilla*, No. 14-1254 (PG) (Oct. 21, 2014), slip op. at 20.

legitimate state interest in procreation. [18]

Further, the marriage and procreation link is consistent with this Court's marriage jurisprudence dating from the early nineteenth century. As Professor Helen Alvare has summarized previously,[19] Supreme Court decisions from the early nineteenth to the late twentieth century have repeatedly recognized, with approval, states' interests in the procreative features of marriage as an essential building block of a healthy, stable democratic society. Even in cases where *only* marriage or childbearing was at issue, but not both, the Court has referred to "marriage and childbirth" together in the same phrase, nearly axiomatically. The following are illustrative:

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[18] *See Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451 (Ariz. Ct. 2003), *reh'g denied*, 2004 Ariz. LEXIS 62, May 25, 2004, *Conde-Vidal v. Garcia-Padilla*, *Id.*; *Obergefell v. Hodges, et al.*, Opinion, United States Court of Appeals for the Sixth Circuit, November 6, 2014, at 13.

[19] Helen M. Alvare, *Same Sex Marriage and the "Reconceiving" of Children*, Case W. Res. L. Rev. 856 (2014); Brief *Amicus Curiae* of Helen M. Alvare, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

- In *Reynolds v. United States*, refusing to allow polygamy on the grounds of the Free Exercise Clause, this Court explained states' interests in regulating marriage with the simple declaration: "Upon [marriage] society may be said to be built."[20]

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[20] 98 U.S. 145, 165 (1879). Indeed, a study of the *Reynolds* case and the history of the entry of Utah into the Union leads to the ironic result that this Court forced traditional marriage onto Utah but now essentially has labeled supporters of traditional marriage as having animus in their hearts, see, e.g., *United States v. Windsor*, 570 U.S. ____(2013). In *Windsor*, the Court stated: "In determining whether a law is motived by an improper animus or purpose, "'[d]iscriminations of an unusual character'" especially require careful consideration. *Supra* at 19." (quoting *Romer v. Evans*, 517 U.S. 620 (1996). DOMA cannot survive under these principles." *Windsor*, Slip Op. at 20. The *Windsor* opinion is replete with references to such animus in the hearts of supporters of traditional marriage. *Amici* respectfully urge this court to completely avoid any such labeling when considering the present case and the arguments within this brief in support of traditional marriage. Further, the Court in *Windsor* cited numerous reasons for its decision to strike down DOMA including federalism, equal protection, due process and "animus," leaving readers unclear as to the actual basis for the decision. *Amici* urge this Court, if it does redefine marriage, to clearly articulate its power and constitutional basis for the decision in a more clear manner than it did in *Windsor*, including expressly addressing the *Reynolds* precedent and whether that decision is overturned.

- In *Murphy v. Ramsey*, this Court reiterated the relationship between marriage and childrearing for the benefit of a functioning democracy, opining:

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman ... the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[21]

- In *Meyer v. Nebraska*, which vindicated parents' constitutional right to have their children instructed in a foreign language, this Court referred not merely to parents' rights to care for children but to citizens' rights "to marry, establish a home and bring up children."[22]

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[21] 114 U.S. 15, 45 (1885).

[22] 262 U.S. 390, 399 (1923).

- In *Skinner v. Oklahoma ex rel. Williamson*, concerning a law punishing certain classifications of felons with forced sterilization, the Court opined: "Marriage and procreation are fundamental to the very existence and survival of the race."[23]

- In *Loving v. Virginia*, striking down a state's anti-miscegenation law, the Court referred to marriage as "fundamental to our very existence and survival," necessarily endorsing the role of marriage in propagating society through childbearing.[24]

- In *Zablocki v. Redhail*, which struck down a Wisconsin law restricting marriage for certain child support debtors, the Court wrote: "[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[25] As in *Loving*, *Zablocki* reiterated that marriage is "fundamental to our very existence and survival,"[26] and recognized, additionally the

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[23] 361 U.S. 535, 541 (1942).
[24] 388 U.S. 1, 12 (1967).
[25] 434 U.S. 374, 386 (1978).
[26] *Id.* at 383.

right to "deci[de] to marry and raise the child in a traditional family setting."[27]

- In *Moore v. City of East Cleveland*, announcing a blood-and-marriage-related family's constitutional right to co-reside, nonetheless referenced the procreative aspect of family life stating: "the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[28]

- In *Lehr v. Robertson*, which involved the parental rights of single fathers, the Court referenced explicitly the states' legitimate interest in maintaining the link between marriage and procreation. Refusing to treat an unmarried father identically to a married father with respect to rights concerning the child, the Court wrote: "marriage has played a critical role . . . in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost

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[27] *Id.* at 386.

[28] 431 U.S. 494, 503–04 (1977).

universally express an appropriate preference for the formal family."[29]

In summary, it is fair to conclude, upon a review of this Court's marriage jurisprudence, that states' interests in the procreational aspects of marriage have been both recognized by this Court and affirmed to be not only legitimate, but essential. The Court should not only follow but reaffirm its many prior statements supporting the interests of states in childbearing and the attendant social stability that are advanced by the opposite-sex tradition of marriage, and for that reason too should resist petitioners' effort to redefine marriage to include same-sex unions.

II. Redefining marriage in genderless terms would break the critical conceptual link between marriage and procreation, almost certainly accelerating the reduction of national fertility rates.

The extension of marriage to same-sex couples constitutes a redefinition of marriage that would fundamentally alter the nature of the institution by severing its connection to procreation. Consistent with the actual experience of states and nations that have adopted this redefinition, such a change will

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[29] 463 U.S. 248, 257 (1983).

erode the role of marriage in our society, ultimately leading to fewer marriages and fewer births.

A. The genderless, adult-centric view of marriage deemphasizes and deprioritizes the function of procreation within the institution of marriage and broader society.

Redefining marriage in genderless terms breaks the critical conceptual link between marriage and procreation by implicitly endorsing an adult-centric model of marriage, and diluting the implicit encouragement the institution of marriage provides for procreation by married couples. It ignores the inherently generative nature of heterosexual marriages, and sends a powerful message that procreation is not a valued societal priority.

Proponents of same-sex marriage ask that this Court require every state to enact and convey a new definition of marriage. This new definition would convey a paradigm shift in state values regarding marriage: that what matters most about marriage is a sexually intimate couple's emotional happiness and willingness to commit to one another, exclusively, for a long time.[30] Proponents also believe that, in the

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[30] *See Obergefell v. Hodges,* Brief for Petitioners James Obergefell, et al., Nos. 14-556, 14-562, 14-571, 14-574, at 29. The *Goodridge* court and well-known same-sex marriage

case of same-sex couples, marriage would connote reparations for past discrimination and stigmatizing of gays and lesbians.[31] However, as Professor Alvare has explained, this shuffling of values deemphasizes the procreative aspects of marriage that this Court has recognized as essential, and paints a picture of marriage closely associated with a "retreat from marriage" in the United States:

> The notion of marriage that same-sex advocates are describing, and demanding from this Court and from every state, closely resembles the adult-centric view of marriage associated with the "retreat from marriage" among...Americans. It would intrinsically and

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advocates urge a similar meaning for marriage. *See Goodridge v. Department of Public Health*, 798 N.E.2d (2003) at 948 (Marriage is the "exclusive commitment of two individuals to each other."); *see, e.g.*, Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, New Republic (Aug. 28, 1989, 1:00 AM), http://www.tnr.com/article/79054/here-comes-the-groom# (describing marriage as a "deeper and harder-to-extract-yourself from commitment to another human being"); Human Rights Campaign, *Talking about Marriage Equality With Your Friends and Family*, www.hrc.org/resources/entry/talking-about-marriage-equality-with-your-friends-and-family (last visited Jan. 24, 2013) (describing marriage as "the highest possible commitment that can be made between two adults").

[31] *Obergefell v. Hodges*, Brief for Petitioners James Obergefell, et al., *supra* note 29, at 18 at 42.

> overtly separate sex and children from marriage, for every marriage and every couple and every child. It promotes a meaning of marriage that empties it of the procreative interests understood and embraced by this Court and every prior generation.[32]

Futher, she points to evidence that this trend away from linking procreation and marriage is becoming characteristic of the "millennial generation" as well:[33]

> Professor Cherlin confirms that among young adults who are not necessarily poor, the idea of "soulmate" marriage is spreading. Never-married Millennials report at a rate of 94% that "when you marry, your [sic] want your spouse to be your soul mate, first and foremost." They hope for a "super relationship," an "intensely private, spiritualized union, combining sexual fidelity,

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[32] Brief *amicus curiae* of Helen M. Alvare, *supra* note 18, at 34.

[33] *See* Wendy Wang & Paul Taylor, *For Millennials, Parenthood Trumps Marriage*, Pew Research Center, 2 (Mar. 9, 2011), http://www.pewsocialtrends.org/2011/03/09/for-millennials-parenthood-trumps-marriage/ (on the question of a child's need for two, married parents, 51% of Millennials disagreed in 2008, compared to 39% of Generation Xers in 1997).

romantic love, emotional intimacy, and togetherness."[34]

Thus, marriage becomes merely a "reparation, a symbolic capstone, and a personal reward, not a gateway to adult privileges and responsibilities,"[35] such as childbearing. This is an especially alarming transformation from a demographic standpoint, because people who do not appreciate the social value of creating and rearing children are simply less likely to do so. And that view poses grave risks to a state's ability to maintain its population.[36]

Undoubtedly the state also values adults' interests in marriage, such as happiness, mutual commitment, increased stability, and social esteem. Yet a view of marriage that focuses solely on these adult-centric interests is incomplete, negates the Court's decisions affirming the states' interests in procreation, and poses a risk to society at large. However compelling such a definition might be, it is fatally defective if its adoption brings about conditions such that our society fails to maintain an adequate fertility rate.

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[34] Andrew J. Cherlin(a), *The Deinstitutionalization of American Marriage*, 66 J. of Marriage & Fam. 848, 856 (2004) in Brief amicus curiae of Helen M. Alvare, *supra* note 18, at 29.

[35] Brief amicus curiae of Helen M. Alvare, *supra* note 18, at 34.

[36] Wardle, *supra* note 14.

As the marriage scholars have carefully laid out, any ruling compelling states to recognize same-sex marriage will adversely alter the institution of marriage *as a whole* by undermining the social norms that are tied to the man-woman understanding of marriage. Those norms guide the procreative tendencies of both homosexual *and* heterosexual individuals. Weakening the social norm that favors reproduction presents grave risks to aggregate fertility, and even greater long-term risks to society as a whole.[37] As Professor Allen has noted, "[s]ocieties incapable of replicating themselves in numbers and quality relative to competing societies simply die out...," and "[p]oorly designed laws"—including laws that undermine long-standing social norms—can "lead to... unsuccessful marriages, which in turn lead to low fertility... and ultimately a decline in the

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[37] Junfu Zhang & Xue Song, *Fertility Difference between Married and Cohabitating Couples: A Switching Regression Analysis*, IZA Discussion Paper No. 3245 (December 2007), available at http://ssrn.com/abstract=1136407; Elizabeth Brown & Alfred Dittgen, *Fertility of Married and Unmarried Couples* (2000), Paper 4.4 presented at United Nations Economic Commission for Europe Conference, Brussells, Belgium, May 2000, available at http://www.unece.org/fileadmin/DAM/pau/_docs/ffs/FFS_2000_FFConf_ContriBrown-Dittgen.pdf; Joyce A. Martin, *et al.*, Ctrs. For Disease Control & Prevention, *National Vital Statistics Reports—Births: Final Data for 2012*, Table 12 (December 30, 2013), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf; Wardle, *supra* note 14, at 784-86.

society."[38] That is precisely what the redefinition of marriage threatens to do, by weakening several norms currently associated with that institution.

In sum, the Court should reaffirm its many prior statements supporting the interests of states in childbearing, childrearing, and social stability that are advanced by opposite-sex marriages. It should resist Petitioners' effort to redefine marriage.

B. There is a correlation between same-sex marriage and lowered fertility rates in the United States.

To the extent a genderless marriage definition deemphasizes and deprioritizes procreation, it would almost certainly reduce fertility rates.[39] While there is a notable absence of scholarly investigation focusing directly on the correlation between same-sex marriage and fertility rates in the United States, some helpful related data is available.

Corrected Prior Studies. Much has been made of a

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[38] Allen, *supra* note 12, at 956.

[39] We focus here on the fertility rate measure (the number of children born to a woman during her lifetime), rather than the crude birthrate (the number of births per 1000 of a population during a hear), because the total fertility rate is generally a better indicator of current birth demographics. Unlike the birth rate measure, fertility rates are not affected by the age distribution of a population.

2009 study by Laura Langbein and Mark Yost, claiming to prove beyond a doubt that there is virtually no adverse impact on societal outcomes specifically related to "traditional family values," and thus no economic rationale for government to regulate or ban those choices.[40] However, as Professor Walter Schumm points out,[41] the Langbein and Yost study had serious limitations. Those limitations are shared by later, similar analyses of state data, such as the oft-cited "Dillender study," which argued that there is no evidence same-sex marriage reduces the opposite-sex marriage rate.[42] Remarkably, neither of these studies took into account the number of years since same-sex marriage had become legal in a state, nor did they examine fertility rates. They seem to share the fallacious assumption that the impact of redefining marriage would show up in measurable and statistically meaningful ways immediately after a redefinition. As Justice Alito's remarks in *Windsor*

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[40] Laura Langbein, & Mark A. Yost, Jr., *Same-sex marriage and negative externalities*, Social Science Quarterly, 90, 292-308 (2009).

[41] Walter R. Schumm, *Same Sex Marriage and Negative Externalities Revisited*, (forthcoming, available upon request).

[42] M. Dillender, *The death of marriage? The effects of new forms of legal recognition on marriage rates in the United States*, Demography, 51, 563-585 (2014); Alexis Dinno, & Chelsea Whitney, *Same-sex marriage and the perceived assault on opposite sex marriage*, PLoS ONE, 8(6), e65730 (2013), in Schumm, *Id.*

suggest, that assumption is unrealistic in the context of an ancient and complex social institution like marriage.[43] Experts on marriage have frequently and correctly noted that such major social changes operate with a "cultural lag" that often requires several years--sometimes a generation or two—to be fully realized.[44]

Professor Schumm analyzed state data sets similar to those used by the Langbein and Dillender studies, but additionally considered the effect of new variables, including the number of years since a state had legalized same-sex marriage, on fertility rates. His analysis revealed that the legalization of same-sex marriage had a direct, negative impact on fertility rates. These results suggest that fertility rates are influenced by changes in same-sex marriage law *over time*. Thus, simply because a state has legalized same-sex marriage does not mean that fertility rates will change immediately; such changes will take several years to be statistically manifest.[45]

This is consistent with other research suggesting that the effects of same-sex marriage laws within a greater society manifest themselves over time, rather

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[43] *Windsor*, 133 S.Ct. at 2715-16.

[44] Andrew J. Cherlin(b), *The Marriage Go-Round* (2009) at 142-43.

[45] Schumm, *supra* note 40, at 6.

than right away.[46] Mircea Trandafir analyzed data from the Netherlands, which formally adopted same-sex marriage in 2001, but had adopted all of its elements by 1998. His analysis has more statistical credibility than Langbein's or Dillender's because it examined the effect of a marriage redefinition over a longer period.

U.S. State Marriage Rate and Fertility Rate Data. National Vital Statistics Reports show a noteworthy correlation between same-sex marriage and decreasing fertility rates. As of 2010, five of the seven States (including Washington, D.C.) with the lowest fertility rates *all* permitted same-sex marriage (or civil union equivalents).[47] In contrast, *none* of the

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[46] Mircea Trandafir, *The effect of same-sex marriage laws on different-sex marriage: Evidence from the Netherlands*, Demography, 51, 317-340 (2014).

[47] The states are Connecticut, New Hampshire, Massachusetts, and Vermont, in addition to the District of Columbia. *See Fertility in Selected USA States 2000-05-10*, http://law2.byu.edu/files/marriage_family/US_fertility_rates_in_sel_states-2000-2005-2010(2).pdf (last visited March 5, 2014). Similarly, as of 2010, the only three European Union countries—Iceland, Ireland and Turkey—that had fertility rates above 2.1 had thus far bucked the trend of EU nations . toward recognizing same-sex marriages; all the other EU nations had fertility rates below replacement levels. European Commission, *Eurostat: Total Fertility Rate, 1960-2011* *available at* http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Total_fertility_rate,_1960-

nine States with the highest fertility rates allowed it before 2010.[48] And while the fertility rates in both groups of States decreased between 2005 and 2010, the percentage decline was almost *twice* as large in the states that allowed same-sex marriage or its equivalent.[49]

The technical analysis contained in Appendix B to the Marriage Scholars Brief substantiates this correlation, using marriage rates as a predictor of fertility rates.[50] Their analysis demonstrates a marked decrease in *opposite-sex* marriage rates—among the states that kept such data[51]—in the several years immediately following the adoption of same-sex marriage, and uses data from the Netherlands study to produce an estimated impact on fertility. The logic is simple and intuitive: Fewer opposite-sex marriages means more unmarried women, which in turn means fewer children born.

2011_(live_births_per_woman).png&filetimestamp=20130129121040. See also *National Vital Statistics Reports*, Volume 61, Number 1 - Births: Final Data for 2010.

[48] Those state are Utah, Alaska, South Dakota, Idaho, Texas, Kansas, Hawaii, Nebraska, and Oklahoma. *Fertility in Selected USA States, supra* note 46.

[49] *Fertility in Selected USA States, supra* note 46.

[50] Brief *Amici Curiae* of Scholars of Marriage, *Obergefell v. Hodges*, supra note 10, Appendix B.

[51] Vermont (49), Connecticut (45), Massachusetts (48). Iowa (14) also kept such data, and is included in the analysis. *National Vital Statistics Reports, supra* note 46.

As explained in their analysis, *every* state that has adopted same-sex marriage and kept the relevant data has seen a substantial decline in the rate of opposite-sex marriages over time—ranging from 5.1 percent to nearly 9 percent.[52] Using the lower end of that range, a 5 percent reduction in long-run marriage rates in the United States, and assuming only half of that reduction would be due to marriage forgone rather than marriage delayed, that data demonstrates that additional 1.275 million women would likely forego marriage over the next fertility cycle (30 years). Under conservative assumptions and over the next 30 years, this would lead to nearly two million fewer births over just one fertility cycle, using the following calculation:

> The average number of children born to a woman *ever* married during her childbearing years (15-44) is 1.84.[53] By contrast, a woman never married during those years averages 0.46 children. Multiplying the latter number by the 1.275 million unmarried women who would have been married but for nationwide same-sex marriage leads to the conclusion that, over a 30-year fertility cycle, we would expect to see 586,500 children born to

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[52] Brief *Amici Curiae* of Scholars of Marriage, *Obergefell v. Hodges*, *supra* note 10, Appendix B.
[53] *Id.*

> unmarried mothers—nearly the population of Washington, D.C.[54] Given the difference between lifetime fertility rates of married versus never-married women (1.84 versus 0.46), the above analysis implies that there will be as many as 1.75 million children who *would* have been born, but will not. This number is larger than the population of Philadelphia.[55]

A reduction so significant in the number of births would have a profound, continuing impact on fertility rates in the United States. At a minimum, these data strongly suggest that abandoning a heterosexual marriage definition would create or increase the *risk* of such a decline. Even such a clear risk amply justifies any state's decision to retain an opposite-sex definition of marriage.

III. A reduction in fertility rates brought about by defining marriage in a way that de-links procreation from marriage could ultimately bring about the consequences associated with sustained below-replacement level fertility rates observed overseas, which are responsible for profound economic and social difficulties.

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[54] *Id.*
[55] *Id.*

The wisdom of recognizing the states' interests in procreation is today more apparent than ever. In the United States, the link between marriage and procreation has weakened considerably in both law and culture, with repercussions for adults, children, and society as a whole.[56] The harmful consequences of this diminished and adult-centered understanding of marriage will likely continue to manifest themselves in terms of declining fertility rates.

Though there have been a number of explanations for the worldwide decline in fertility rates, and the entire explanation may be a combination of different factors, the adoption of same-sex marriage is likely to contribute to such a decline in any state, given the demonstrated effect (discussed in Section IIB, infra) that the adoption of same-sex marriage policies has on fertility rates.

One need not look far to observe the correlation between a society's fertility rates and its long-term ability to support a strong economy.[57] The economic

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[56] See Section IIB, *supra*.

[57] *See, e.g., How Declining Birth Rates Hurt Global Economies*, National Public Radio (Oct. 3, 2011) (transcript reprinted at www.npr.org /2011 /10/02/131000410/how-declining-birth-rates-hurt-global_economies); Philip Longman, *The Empty Cradle: How Falling Birthrates Threaten World Prosperity and What To Do About It, passim* (2004); Jonathan Last, *What to Expect When No One's*

crises created from sub-replacement fertility rates over time result in a reduced demand for goods and services and an aging work force, which results in fewer available workers to support social programs.

Sub-replacement fertility occurs when a country's Total Fertility Rate (TFR), expressed in the number of children born per one woman, is sustained at such a rate that each successive generation will be less populous than the one previous. In developed countries, sub-replacement fertility is any rate below 2.1.[58] Fertility is projected to be the most influential component in population trajectories over the next 100 years.[59]

As of 2013, about 48% of the world population lives in nations with sub-replacement fertility.[60] Most

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Expecting: America's Coming Demographic Disaster, passim (2013).

[58] Thomas J. Espenshade, Juan Carlos Guzman, & Charles F. Westoff, *The surprising global variation in replacement fertility*, Population Research and Policy Review 22 575, 580 (2003). (Note: The replacement threshold can be as high as 3.4 in some developing countries due to of higher mortality rates.)

[59] United Nations, Department of Economic and Social Affairs, Population Division (2013), *Fertility Levels and Trends as Assessed in the 2012 Revision of World Population Prospects* (2013), available at http://www.un.org/en/development/desa/population/publications/pdf/fertility/Fertility-levels-and-trends_WPP2012.pdf,

[60] *Id.* Note: this number is projected to increase to over 80%

nations of Europe, along with Australia, Russia, and China, are included in this group.[61] Many of these countries still have growing populations, but this growth is due to external factors, such as immigration and increased life expectancy, rather than births. Some countries have low enough or have sustained sub-replacement fertility levels over a long enough period that population decline has resulted. Importantly, population momentum can become negative if fertility rates remain under replacement-level for long enough, bringing to bear significant, destabilizing economic and social issues.[62] This is currently manifest or forecast for most of the countries of Europe and East Asia.[63]

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by 2098.

[61] *Id.*

[62] Such destabilization has occurred before in Western European social history; famously, during the late Roman period when imperial officials constantly tried unsuccessfully to encourage the Roman governing classes to have enough children to sustain their population levels. O'Brien at 430.

[63] European Commission, *Europe's Demographic Future: Facts and Figures on Challenges and Opportunities*, (2007). http://ec.europa.eu/social/main.jsp?catId=502&langId=en&pubId=78&type=2&furtherPubs=yes. European Parliament Resolution: 2007/2156(INI), *The Demographic Future of Europe*, (February 21, 2008). http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0066+0+DOC+XML+V0//EN. *See also* Nicholas Eberstadt(a), *Demographic Trends in Northeast Asia: Changing the Realm of the Possible*, Far E. Econ. Rev. (May 2007).

Several of these destabilizing effects on society are worth mentioning explicitly:

- *Increase in the dependency ratio.* Sustained sub-replacement fertility leads to "top-heavy" populations, wherein the number of retired citizens drawing public pensions rises in relation to the number of workers.[64] As the workforce ages and retires, more people claim pension benefits and fewer people work and pay income taxes. This has major implications for public pension systems, which have become integral to all advanced democratic nations and the citizens they support. The preservation of public pension systems requires a continuous supply of sufficiently large young generations of workers. Persistently low fertility rates endanger this supply, and therefore the public pension systems they support, creating a risk of increased tax rates on the remaining workforce. It is also worth noting that benefits reductions or system collapse has a disparate impact upon the

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[64] Naohiro Ogawa & Robert D. Retherford, *Japan's Baby Bust: Causes, Implications, and Policy Responses*, Population and Health Series, No. 118, East-West Center (2005), available at http://www.eastwestcenter.org/fileadmin/stored/pdfs/POPwp118.pdf.

retired, disabled, and poor who principally depend upon the support of such systems.

Western Europe appears to face just this threat since its average birth rate has dropped well below replacement levels and at present there is no indication of a significant reversal. Asia is threatened by the same prospect.[65]

- *Increased government spending on health care and pensions.* Retirees generally pay lower income taxes because they are not working. This combination of higher spending commitments and lower tax revenue presents concern for any government, but especially those with existing debt issues and unfunded pension schemes.

- *Increased taxes on remaining workforce.* As the dependency ratio increases, more workers drawing retirement and fewer workers are left to pay income taxes. In order to make up the shortfall and pay the increased costs of health and entitlement programs, taxes on the remaining workers must increase. This creates disincentives to work and disincentives for firms to invest, bringing about a fall in productivity and growth.

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[65] European Commission, *supra* note 62; *See also* Eberstadt(a), *supra* note 61, *passim*.

- *Worker shortage.* As a majority of a population ages into retirement, there is created a dearth of productive workers. [66] Such a worker shortage can push up wages, causing wage inflation.

- *Reduced capital investment.* If workers place a higher percentage of income into pension funds, the amount of savings available for more productive investment is reduced, leading to lower rates of economic growth.

- *Immigration.* Governments may attempt to compensate for low fertility by encouraging immigration. However, immigration is not a reliable solution to a country's population or fertility decline.[67] First, the number of possible immigrants is finite and subject to a number of social and political factors. Second, it is difficult to assert meaningful control over whether, when, or how many persons will immigrate.

- *Diminishing international influence.*

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[66] Ogawa & Rutherford, *supra* note 64.

[67] United Nations, *Replacement Migration: European Union*, 90, (2001) http://www.un.org/esa/population/publications/migration/migration.htm.

Demographic trends create powerful pressures for world affairs.[68] If a country experiences a loss in fertility, that country's share of world economic output and international economic influence should be expected to decline as well, perhaps considerably. That country's military influence is likely to trend similarly, necessitating a heavy reliance on international alliances to protect its national security.

- *Familial recomposition.* If fertility rates are sustained below replacement level, average family composition changes, such that each tends to have only one or two children. This reduces a child's number of siblings, aunts, uncles, and other extended family members.

Faced with these prospects, many countries have advanced pro-natalist policies to encourage higher fertility. Such policies range from reduced support for contraception, to monthly allowances for couples with children, to paid maternal and paternal leave, as well as free or subsidized daycare.[69] It is worth noting that, to date, every European country that has adopted same-sex marriage has also had to

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[68] Nicholas Eberstadt(b), *Japan Shrinks*, Wilson Quarterly (2012). http://wilsonquarterly.com/article.cfm?aid=2143.

[69] David E. Bloom & David Canning, *Europe's Looming Population Bust*. Entre Nous – The European Magazine for Sexual and Reproductive Health, *passim* (2006).

implement some form of pro-natalist policy.[70]

These programs, while arguably effective in some cases, themselves come at a great cost. The example of Japan is illustrative here. Thanks in part to its approach to financing programs to combat its fertility crisis, Japan already has the highest ratio of gross public debt to gross domestic product (well over 200 percent) of the developed nations.[71] Projections by researchers at the Bank for International Settlements imply that this ratio could rise to a mind-boggling 600 percent by 2040. (Greece's public debt, by contrast, amounted to about 130 percent of its GDP at the start of its current default drama.) While Japan might well be able to service such a mountain of debt without risk of sovereign default (assuming the country's low-interest-rate environment continues to hold), it is hard to see how a recipe for rapid or even moderate economic growth could be cooked up with these ingredients.

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[70] Gustavo De Santis, *Pronatalist Policy in Industrialized Nations*, in Demography: Analysis And Synthesis; A Treatise in Population Studies, Vol. 4:137 at 144, Graziella Caselli, Jacques Vallin, & Guillaume Wunsch, eds. (2006) (The countries are The Netherlands, Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark, France, United Kingdom, Luxembourg, and Finland.)

[71] Eberstadt(b), *supra* note 68.

In sum, to avoid the consequences of sustained, below-replacement fertility rates, the United States should not require states to assume the additional risk that same-sex marriage poses to fertility rates.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions in all four of the cases below.

Respectfully submitted,

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